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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SHARON KENNEDY, as Trustee, etc.,

Plaintiff and Respondent,

v.

LOWTHORP RICHARDS McMILLAN
MILLER & TEMPLEMAN et al.,

Defendants and Appellants,

JEAN YUKI,

Real Party in Interest and Respondent.

2d Civil No. B220613
(Super. Ct. No. 1338440)
(Santa Barbara County)

A law firm provides professional services enabling its elderly client to recover title to her home from her daughter and to thereafter place it in a trust to provide for her "health, maintenance and support." The firm submits its bill for fees and costs to the trustee for payment. The trustee, in turn, petitions the trial court seeking approval. The trial court denies the claim for fees finding the failure to submit attorney billings required denial of the fee request. It did this despite the trustee's offer to immediately submit the billings as the court requested. The offer was summarily rebuffed without hearing. We conclude that the trial court abused its discretion in summarily denying the offers to furnish the very information the court requested. Accordingly we reverse and

remand the cause to afford the appellant the hearing it did not receive. In doing so, we express no opinion on the merits of the claim.

FACTS AND PROCEDURAL HISTORY

Amy Kakimoto is 99 years old. Her husband, Ikuo, died in 1994. The couple's principal asset was the family residence where Kakimoto resided since it was built in the 1960's. Kakimoto's daughter, respondent Jean Yuki, assisted her mother with her financial affairs after Ikuo's death. In doing so, Yuki caused the home to be placed in a trust giving Kakimoto a life estate and the remainder to be vested in Yuki. Yuki was the named trustee. A dispute subsequently arose over allegations of improprieties in the management of the trust and whether Kakimoto was receiving the benefits to which she believed she was entitled.¹

On March 3, 2008, appellant Lowthorp, Richards, McMillan, Miller & Templeman (Lowthorp firm) filed a petition to recover trust property and a complaint for financial elder abuse, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, cancellation of instrument, slander of title, and quiet title on behalf of Kakimoto against Yuki. The petition alleges that in 1998, Kakimoto established a trust and executed a grant deed placing the residence in the trust. The petition further alleges that, in 2006, Yuki coerced Kakimoto into signing a grant deed transferring Kakimoto's interest in the residence to Yuki and that Kakimoto did not know or understand that executing the trust deed would remove the property from her trust. After Yuki received the grant deed, she executed a new grant deed placing the residence in her own trust.

Yuki filed an answer contending that Kakimoto "bec[a]me subject to manipulation by Sharon [Satow]" (Yuki's daughter) and initiated the filing of the petition

¹ Both in the pleadings and at oral argument there were allegations of improprieties in the creation and management of this trust including claims that in the creation of the original trust document Kakimoto was unrepresented despite having had an earlier estate plan in place. The record is insufficient for us to detail the claims and their legitimacy. What is clear is that the claims were sufficiently contentious and protracted so that they resulted in litigation to reform the trust, two mediations, and substantial efforts on the part of counsel for both Kakimoto and Yuki.

to obtain money and property from Kakimoto. Yuki further asserted that she did not make false representations to Kakimoto or coerce her into amending the trust documents. Yuki asserted she "has been the primary caregiver for her mother, Kakimoto, with no other compensation for approximately 14 years. In return, and in fulfillment of her long-standing promise, Kakimoto voluntarily, knowingly and intentionally transferred a remainder interest to Yuki, reserving a life estate, consistent with her historic estate planning instruments over the last 10 years."

In her deposition, Kakimoto testified that she did not intend to give Yuki the family residence. She agreed to sign documents revising the trust because Yuki told her that if she did not the estate would be subject to estate taxes which would significantly diminish the assets of the trust.

In September 2008, Kakimoto, Yuki, and Satow participated in private mediation. The mediation resulted in a settlement agreement in which Yuki agreed to convey the residence to the Amy Kakimoto Irrevocable Trust for Kakimoto's sole benefit during her lifetime. Pursuant to the settlement, the trust was to provide that Kakimoto is entitled to use all property in the trust for her "health, maintenance and support"--even if such care requires the entire principal of the trust. The settlement agreement provided that each party would bear her own attorney fees. The residence was the only asset of the Trust.

Sharon Kennedy was appointed trustee of the Trust. Kennedy obtained a home equity line of credit on the residence in the amount of \$508,004 to provide funds for Kakimoto's medical and other expenses. Kennedy estimated that the family residence has a fair market value of about \$940,000.

After the Trust was established, the Lowthorp firm submitted a bill for \$101,178.62 in attorney fees and costs to Kennedy. Yuki objected to payment of the fees from Kakimoto's trust. On July 17, 2009, Kennedy filed a petition for instructions to trustee seeking approval to pay several expenses relating to Kakimoto's care and maintenance of the residence. The petition also sought permission to pay \$101,178.62 in attorney fees and costs incurred by the Lowthorp firm for assisting Kakimoto to recover

title to the family residence. Kennedy filed a declaration with the petition which states in part:

"Petitioner has been presented with the billing statement of [the Lowthorp firm], who represented Settlor in the litigation described in paragraph 2 above. [The Lowthorp firm] reserved all applicable privileges in disclosing the billing statement to petitioner, and therefore petitioner is not authorized to attach a copy to this petition. Of course, the statement can be presented for the Court's *in camera* review if the Court wishes. Petitioner has reviewed the bill and notes that it covers the period beginning May 1, 2008, and ending March 25, 2009, and that all time entries appear to relate either to the subject litigation or the related estate planning for Settlor. The total amount of the bill is \$101,178.62, of which \$14,361.22 represents costs advanced. [The Lowthorp firm] has requested that petitioner pay the statement from the Trust, on the basis that the fees and costs incurred fall within the 'maintenance and support' standard of invasion set forth in the Trust instrument. [The Lowthorp firm] asserts that, had [the] services not been rendered, Settlor would not have recovered ownership of the [family residence]; since that property is now being used for Settlor's support, his fees in recovering the property were incurred for Settlor's 'support.'

". . . Petitioner has been confronted with objections to the payment of [the Lowthorp firm's] bill from Jean Yuki and her counsel, who opposed Settlor and [the Lowthorp firm] in the litigation. As noted above, Ms. Yuki is a vested remainder beneficiary of the Trust, and so any payment from Trust principal threatens the value of her expectancy. Ms. Yuki argues that [the Lowthorp firm] did not represent Settlor in the litigation, but rather Sharon Satow, and so the Trust should not be liable for [the Lowthorp firm's] fees.

". . . Petitioner seeks this Court's instruction regarding payment of the fees from the Trust. To petitioner, it appears that the fees may well fit within 'maintenance and support' standard governing invasion of Trust principal, and thus can properly be paid from the Trust. Faced with Ms. Yuki's objection, however, petitioner is unwilling to

pay the fees without giving both parties an opportunity to present their respective arguments to the Court, and obtaining this Court's guidance in the matter."

On August 28, 2009, the trial court granted petitioner leave to pay all expenses except the fees of the Lowthorp firm. In addressing the claim for fees, the court declared: "I have no idea who retained you^[2] or the basis of what any of your work was. I've got nothing. And I'm not going to okay a bill for \$100,000 plus when I don't know who retained you or what work was done or anything about it. Simply submit the bill."

In response to the court's request, counsel immediately offered to submit the billings and retainer for the court's review, to which the court replied: "I don't see that that's going to help anything, is it? . . . The problem is that the work was done before the trust was even created." In effect, the court barred submission of the very evidence it had solicited just moments before. Written findings were neither requested nor issued.

DISCUSSION

Standard of Review

We review a probate court's ruling on an application to use trust assets to pay attorney fees for abuse of discretion. (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234.) Such abuse is shown where the court forecloses examination of an entire class of evidence, an offer of proof has been made, and a different result would have been probable without the error. (Evid. Code, § 354; *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 372; *Montez v. Superior Court* (1970) 10 Cal.App.3d 343, 351.)

The Trial Court Abused its Discretion by Denying

The Attorney Fee Application Without a Fair Hearing

As part of its supervision over trusts, a probate court has a special responsibility to ensure that fee awards are reasonable. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 269.) "Presented with a section 17200 petition to settle an account, 'the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's

² The question concerning counsel's retention was odd inasmuch as during the pendency of the entire action the Lowthorp firm had been Kakimoto's counsel of record.

administration.'" (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.) "[A]ttorney fees deriving from probate court litigation are subject to concerns sufficiently unique, we believe, to distinguish them from fees generated in ordinary civil litigation." (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 98.)

Absent evidence supporting the amount claimed for fees, including the firm's billing records, the trial court would be correct in denying the claim over objection. (See, e.g., *Donohue v. Donohue*, *supra*, 182 Cal.App.4th at p. 268 [". . . it is imperative in trust litigation that records support the contentions of the trustee and others that the trust should pay the disputed compensation and fees"].) Merely presenting billing records to the trustee is not sufficient. Due to the trial court's "special responsibility" to ensure that fee awards are reasonable, the court must be provided with billing records (redacted to protect confidentiality, if necessary) or other evidence, enabling it to determine the reasonableness of the attorney fee request.

Here, the trial court abused its discretion by denying attorney fees without reviewing the proffered evidence documenting those fees and without determining whether the Trust's provision for "health, maintenance and support" authorizes payment of Kakimoto's attorney fees from the Trust, the very records it had but moments before requested.³ Therefore, we will remand for determination of those issues. On remand, the noticed motion procedure required by California Rules of Court, rule 3.1702 shall be used.

The order is reversed and the matter is remanded to the trial court to determine whether attorney fees are authorized by the terms of the Trust and, if so to

³ Counsel for respondent urges that the provision in the settlement requiring that each side bear its own attorney fees suggests that appellant implicitly acknowledged that the trust would not be responsible for counsel's fees. Of course the issue of the payment of fees for "health, maintenance and support" is before the court. But the mere statement that each side bears its own fees suggests that neither would be accountable for the fees of the other.

whom they are to be paid. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

J. William McLafferty, Judge

Superior Court County of Santa Barbara

Lowthorp Richards McMillan Miller & Templeman and Darin Marx for
Defendants and Appellants.

Reicker, Pfau, Pyle & McRoy LLP, Alan A. Blakeboro and Diana Jessup
Lee for Real Party in Interest and Respondent Yuki.

No appearance for Plaintiff and Respondent Kennedy.